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Dr. Q *v.* College of Physicians and Surgeons of British Columbia, [2003] 1 S.C.R. 226, 2003 SCC 19

**College of Physicians and Surgeons of British Columbia** *Appellant*

*v.*

**Dr. Q** *Respondent*

**Indexed as: Dr. Q *v.* College of Physicians and Surgeons of British Columbia**

**Neutral citation: 2003 SCC 19.**

File No.: 28553.

2002: October 2; 2003: April 3.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

on appeal from the court of appeal for british columbia

*Administrative law — Judicial review — Standard of review — Professional disciplinary bodies — Physicians and surgeons — Inquiry Committee of College of Physicians and Surgeons finding that physician had sexual relationship with patient and was guilty of infamous conduct — Reviewing judge disagreeing with Committee's findings on credibility and setting aside decision — Court of Appeal dismissing College's appeal as it could not conclude that reviewing judge was "clearly wrong"*

*— Whether reviewing judge exceeded limits of judicial review by engaging in reconsideration of Committee's findings — Whether Court of Appeal applied an inappropriate test in assessing decision of reviewing judge.*

In 1998, an Inquiry Committee of the appellant College found that the respondent physician had taken physical and emotional advantage of one of his female patients and was guilty of infamous conduct. The relationship began in early 1994 as a therapeutic one, after the patient sought help in treating her depression. She alleged that, at some point in the spring of 1995, the relationship became sexual and that this sexual relationship lasted for approximately 16 months. The respondent denied the allegations. In reaching its conclusion that sexual acts had occurred, the Committee stated that it accepted the patient's evidence and disbelieved that of the respondent. The Council of the College suspended the respondent from the practice of medicine for 18 months, with stringent conditions for his return to the profession. On an appeal under the *Medical Practitioners Act*, the reviewing judge set aside the Inquiry Committee's decision, disagreeing with its findings as to credibility. The Court of Appeal dismissed the College's appeal because it could not conclude that the reviewing judge was "clearly wrong".

*Held*: The appeal should be allowed and the order of the College restored.

The reviewing judge erred by applying too exacting a standard of review and substituting her own view of the evidence for that of the Committee. The standard of "clear and cogent evidence" does not permit the reviewing judge to enter into a re-evaluation of the evidence. Moreover, the fact that the Act grants a right of appeal does not mean that the matter could be dealt with without recourse to the usual administrative law principles pertaining to standard of review. In a case of judicial review such as this, the Court applies the pragmatic and functional approach, which calls upon a reviewing court to weigh a series of factors in an effort to discern whether a particular issue before the administrative body should receive exacting review, undergo significant searching or testing, or be left to the near exclusive determination of the decision-maker. These various postures of deference correspond, respectively, to the standards of correctness, reasonableness *simpliciter*, and patent unreasonableness. In this case, a consideration of the four factors leads to a standard of reasonableness *simpliciter*. The reviewing judge did not adopt this analysis. Indeed, she made no reference at all to the pragmatic and functional approach. The effect of the reviewing judge's failure to conduct the usual administrative law analysis was to review the Committee's findings of fact on what amounted to a correctness standard. While one of the factors under the pragmatic and functional approach is whether the statute grants a right of appeal, the reviewing judge considered only this factor and failed to address the need for deference in view of the purpose of the Act and the nature of the problem, credibility.

The Court of Appeal erred in failing to set aside the reviewing judge's order. The Court of Appeal determined that the standard to be applied in assessing the judgment of the reviewing judge was whether in her re-weighing of the evidence she was clearly wrong. This is not the appropriate test at the

secondary appellate level. The role of the Court of Appeal was to determine whether the reviewing judge had chosen and applied the correct standard of review, and in the event she had not, to assess the administrative body's decision in light of the correct standard of review, reasonableness. At this stage in the analysis, the Court of Appeal is dealing with appellate review of a subordinate court, not judicial review of an administrative decision. The question of the right standard to select and apply is one of law and, therefore, must be answered correctly by a reviewing judge. The Court of Appeal erred by affording deference where none was due. The Court of Appeal should have corrected the reviewing judge's error, substituted the appropriate standard of administrative review, and assessed the Committee's decision on this basis. Judged on the proper standard of reasonableness, there was ample evidence to support the Committee's conclusions.

**Cases Cited**

**Applied:** *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; **referred to:** *Jory v. College of Physicians and Surgeons of British Columbia*, [1985] B.C.J. No. 320 (QL); *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; *R. v. Khan*, [1990] 2 S.C.R. 531; *R. v. Smith*, [1992] 2 S.C.R. 915; *R. v. Starr*, [2000] 2 S.C.R. 144, 2000 SCC 40; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corp.*, [1948] 1 K.B. 223; *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1; *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, [2001] 2 S.C.R. 281, 2001 SCC 41; *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, [2001] 2 S.C.R. 100, 2001 SCC 36; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, 2002 SCC 11; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554; *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33; *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802; *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 S.C.R. 114; *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3; *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20.

**Statutes and Regulations Cited**

*Medical Practitioners Act*, R.S.B.C. 1996, c. 285, ss. 3, 53, 60, 73.

**Authors Cited**

Mullan, David J. *Administrative Law*. Toronto: Irwin Law, 2001.

APPEAL from a judgment of the British Columbia Court of Appeal (2001), 198 D.L.R. (4th) 250, 154 B.C.A.C. 12, [2001] B.C.J. No. 887 (QL), 2001 BCCA 241, upholding a judgment of the British Columbia Supreme Court, [1999] B.C.J. No. 2408 (QL), setting aside a decision of the College of Physicians and Surgeons, Inquiry Committee. Appeal allowed.

*David Martin* and *Karen Weslowski*, for the appellant.

*Christopher E. Hinkson, Q.C.*, and *Nigel L. Trevethan*, for the respondent.

The judgment of the Court was delivered by

THE CHIEF JUSTICE —

I. Introduction

1 On January 5, 1998, an Inquiry Committee of the College of Physicians and Surgeons of British Columbia found that Dr. Q had taken physical and emotional advantage of one of his patients, Ms. T, and was guilty of infamous conduct. As a consequence, the Council of the College of Physicians and Surgeons suspended Dr. Q from the practice of medicine for 18 months, with stringent conditions for his return to the profession.

2 Dr. Q appealed this decision to the British Columbia Supreme Court, as provided by the *Medical Practitioners Act*, R.S.B.C. 1996, c. 285 (the "Act"). The reviewing judge, Koenigsberg J., set aside the Inquiry Committee's decision ([1999] B.C.J. No. 2408 (QL)). The College then appealed to the Court of Appeal of British Columbia, which dismissed the appeal ((2001), 198 D.L.R. (4th) 250, 2001 BCCA 241). The College of Physicians and Surgeons appeals to this Court, arguing that the British Columbia courts erred in setting aside the decision of the Inquiry Committee and Dr. Q's suspension.

3 This appeal raises a number of questions about the legal relationships between administrative bodies, reviewing courts, and courts of appeal. The result in this case, therefore, depends

upon a clear understanding, and calls for a clear articulation, of the legal principles that guide review at each of these levels.

4 I conclude that the reviewing judge of the British Columbia Supreme Court exceeded the limits of judicial review authorized by the Act by engaging in a reconsideration of the Committee's findings of fact and that the Court of Appeal erred in failing to set aside the order of the reviewing judge. In the result, I would allow the appeal and reinstate the order of the College of Physicians and Surgeons against Dr. Q.

## II. The Facts and Decisions

5 The relationship between Dr. Q and Ms. T began in early 1994 as a therapeutic one. Ms. T sought Dr. Q's help in treating her depression. Ms. T alleged that, at some point in the spring of 1995, the relationship became sexual and that this sexual relationship lasted for approximately 16 months. The case ultimately turned on an assessment of credibility. Dr. Q flatly denied Ms. T's allegations that they had been involved sexually. The Committee heard the oral evidence of both parties and considered corroborative evidence. In reaching its conclusion that sexual acts had occurred, the Committee stated that it accepted Ms. T's evidence and disbelieved that of Dr. Q (Report of the Inquiry Committee, January 5, 1998, p. 20).

6 Section 73 of the Act affords an appeal to the courts "on the merits" of the case. Dr. Q appealed to the British Columbia Supreme Court. On appeal, Koenigsberg J., in chambers, accepted that "[t]he task of the Committee was to determine the guilt or innocence of Dr. Q. based almost completely on the credibility of the witnesses" (para. 2). Koenigsberg J. posed the question before her as follows (at para. 4):

> The issue is whether the evidence before the Committee objectively assessed meets the standard of clear and cogent evidence to support the finding that Dr. Q. was guilty.

She reviewed the evidence and disagreed with the Committee's findings as to credibility. As a result, Koenigsberg J. held that the evidence was not "sufficiently cogent" (para. 39) to make it safe to uphold the findings of the panel. She allowed the appeal and set aside the finding of infamous conduct.

7 The College appealed to the British Columbia Court of Appeal. The Court of Appeal reviewed Koenigsberg J.'s decision, felt that it could not reach the conclusion that she was "clearly wrong" (para. 30) and, therefore, dismissed the appeal.

III. Analysis

8 Since this case turns on the respective roles of an administrative tribunal and the courts, it is necessary to consider in turn the legal principles that guide the Committee, the reviewing judge, and the Court of Appeal.

A *The Role of the Committee*

9 The Province of British Columbia has ultimate authority and responsibility for the governance of the medical profession in that province. It has delegated part of this responsibility to the College of Physicians and Surgeons through the mechanism of an Inquiry Committee whose task it is to investigate complaints against members of the profession. The Committee gives its opinion to the College, which imposes a sanction if the complaint is found to have merit.

10 The Inquiry Committee in this case consisted of two physicians, a public representative, and a member of the Bar of British Columbia. Sections 53 and 60 of the Act empowered it to decide the issues raised by the complaint. The merits of the complaint are to be determined by the Committee on the basis of the evidence and its findings on credibility.

11 The Committee had three tasks before it in dealing with the allegations levelled against Dr. Q: first, it had to make findings of fact, including assessments of credibility; second, it had to select the appropriate standard of proof; and, third, it had to apply the standard of proof to the facts as found to determine whether the alleged impropriety had been proven. The Committee applied the standard of "clear and cogent evidence", enunciated in *Jory v. College of Physicians and Surgeons of British Columbia*, [1985] B.C.J. No. 320 (QL) (S.C.), and all parties accepted that this was appropriate. This standard was not challenged in the courts below nor in this Court, and the case law demonstrates that it is routinely used in professional conduct inquiries in the Province of British Columbia. The determination of whether the allegations had been proven to this standard followed irresistibly from the Committee's assessment of the witnesses' evidence, leaving credibility as the main issue before the Committee.

12 The Committee heard the oral evidence of both Dr. Q and Ms. T and made assessments of the manner in which each had delivered their evidence. The Committee found Ms. T to be "forthright and direct" and stated that, even on questions of a very personal nature, she "answered questions directly and responsively" (p. 20). In contrast, the Committee felt that Dr. Q was "initially nervous in giving his

evidence" and, even after he settled down, "he was nonetheless somewhat hesitant and evasive when dealing with difficult questions" (p. 20). But the Committee also looked to the internal consistency of both parties' evidence. In a letter written to the College, Dr. Q had stated that he "did see Ms. [T] for lunch on at least one occasion after she stopped seeing [him] as a patient" (p. 20 (emphasis added)). Yet on cross-examination, Dr. Q admitted to having lunch with Ms. T on between 10 and 15 occasions. The Committee viewed this discrepancy as diminishing Dr. Q's credibility.

13 The Committee also assessed the substance of both stories in light of potentially corroborative evidence. On a number of important details, the Committee found that the external evidence was corroborative of Ms. T's testimony. For example, Ms. T was able to describe particular physical features of Dr. Q in a way that the Committee found was more "consistent with her visual observation" (p. 26) of Dr. Q's body than having heard about them from Dr. Q, as he had suggested. The Committee concluded that Ms. T's ability to provide a vivid description of Dr. Q's new office, which he had moved into after they had ceased their therapeutic relationship, was inconsistent with Dr. Q's assertion that Ms. T had only been in the new office on one occasion, and even then only briefly. Furthermore, contrary to Ms. T's version of events, Dr. Q denied that he had ever dined at a particular restaurant with Ms. T. Yet the owner of the restaurant confirmed that a reservation in Dr. Q's name was made and used at a time consistent with the evidence given by Ms. T. The Committee examined a letter written by Dr. Q to Ms. T and concluded that its contents were "likewise more consistent with a relationship which has gone beyond the platonic" (p. 28). Finally, the Committee considered Ms. T's evidence that, subsequent to the termination of their therapeutic relationship, she and Dr. Q would meet at his office at the end of the day, at which point they would engage in sexual activity. The Committee heard evidence from a witness, Ms. K, which confirmed that Ms. T had, indeed, been in Dr. Q's office at the end of the day, well after their therapeutic relationship had ended. Dr. Q offered no explanation (p. 29).

14 On the basis of the manner and internal consistency of their testimony, as well as all of the corroborative evidence, the Committee stated that it "accepts the evidence of Ms. [T] as to the occurrence of the sexual acts described in her evidence and disbelieves Dr. [Q] in his evidence where he denies that the sexual encounters occurred" (p. 20). As noted, the conclusion that a sexual relationship had existed and that this constituted infamous and unprofessional conduct flowed inexorably once these findings of credibility had been made. As such, the key question in this case is whether the reviewing judge should have interfered with the findings of credibility made by the Committee.

15 Having set out the responsibility and tasks of the Committee in this case, and summarized its conclusions, I turn to the duties of the reviewing judge in the Supreme Court of British Columbia.

B. *The Role of the Reviewing Judge*

16 The Act permits an appeal to the Supreme Court of British Columbia. As Koenigsberg J. noted, the reviewing judge's task is not to substitute his or her views of the evidence for those of the tribunal, but to review the decision with the appropriate degree of curial deference. However, having said this, Koenigsberg J. engaged in a wide-ranging review of the evidence and in effect substituted her views on the credibility of the witnesses for those of the Committee.

17 This approach appears to have been connected to two assumptions. The first was the apparent assumption that since the standard of proof was the intermediate standard of clear and cogent evidence, the reviewing judge was required to review the evidence and make her own evaluation of whether it reached this standard. The second was the assumption that because the Act expressly confers a right of appeal, the review was not to be treated like the usual review of the decision of an administrative tribunal, which requires the reviewing judge to first determine the appropriate standard of review and then apply that standard to the decision. In my view, both of these assumptions are mistaken. As a result of their application, the reviewing judge applied the wrong standard of review and interfered unduly in the Committee's findings of credibility and fact.

(1) The Distinction between Standard of Proof at First Instance and Standard of Judicial Review

18 The first erroneous assumption was that because the standard was that of clear and cogent evidence, the reviewing judge was required to revisit the Committee's findings of credibility and fact. The reviewing judge took the requirement for clear and cogent evidence as an entree into a reconsideration of the facts. She stated at para. 4:

> Thus guided it remains to consider the findings of the Committee in this case in relation to credibility. The issue is whether the evidence before the Committee objectively assessed meets the standard of clear and cogent evidence to support the finding that Dr. Q. was guilty.

19 The standard of clear and cogent evidence does not permit the reviewing judge to enter into a re-evaluation of the evidence. Indeed, *Jory*, *supra*, upon which the reviewing judge relied, emphasized that findings of fact or credibility are generally due considerable deference (paras. 12-13). The requirement for "clear and cogent evidence" is a matter relating to the standard of proof employed at the Committee level, ensuring that the Committee is alive to the gravity of the consequences of their decision. It is a legal standard that the administrative decision-maker must apply to the evidence in order to determine the outcome of the case. It does not instruct a reviewing court on how to scrutinize the decision of the administrative decision-maker. This is solely a question of standard of review, to be resolved by applying the pragmatic and functional approach.

(2) The Primacy of the Pragmatic and Functional Approach

20 This brings us to the second erroneous assumption – that because the Act grants a right of appeal, the matter could be dealt with without recourse to the usual administrative law principles pertaining to standard of review.

21 In a case of judicial review such as this, the Court applies the pragmatic and functional approach that was established by this Court in *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, and gained ascendancy in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, and *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982. The term "judicial review" embraces review of administrative decisions by way of both application for judicial review and statutory rights of appeal. In every case where a statute delegates power to an administrative decision-maker, the reviewing judge must begin by determining the standard of review on the pragmatic and functional approach. In *Pushpanathan*, this Court unequivocally accepted the primacy of the pragmatic and functional approach to determining the standard of judicial review of administrative decisions. Bastarache J. affirmed that "[t]he central inquiry in determining the standard of review exercisable by a court of law is the legislative intent of the statute creating the tribunal whose decision is being reviewed" (para. 26). However, this approach also gives due regard to "the consequences that flow from a grant of powers" (*Bibeault*, at p. 1089) and, while safeguarding "[t]he role of the superior courts in maintaining the rule of law" (p. 1090), reinforces that this reviewing power should not be employed unnecessarily. In this way, the pragmatic and functional approach inquires into legislative intent, but does so against the backdrop of the courts' constitutional duty to protect the rule of law.

22 To determine standard of review on the pragmatic and functional approach, it is not enough for a reviewing court to interpret an isolated statutory provision relating to judicial review. Nor is it sufficient merely to identify a categorical or nominate error, such as bad faith, error on collateral or preliminary matters, ulterior or improper purpose, no evidence, or the consideration of an irrelevant factor. Rather, the pragmatic and functional approach calls upon the court to weigh a series of factors in an effort to discern whether a particular issue before the administrative body should receive exacting review by a court, undergo "significant searching or testing" (*Southam*, *supra*, at para. 57), or be left to the near exclusive determination of the decision-maker. These various postures of deference correspond, respectively, to the standards of correctness, reasonableness *simpliciter*, and patent unreasonableness.

23 Much as the principled approach to hearsay articulated in *R. v. Khan*, [1990] 2 S.C.R. 531, and *R. v. Smith*, [1992] 2 S.C.R. 915, eclipsed the traditional categorical exceptions to the hearsay rule (*R. v. Starr*, [2000] 2 S.C.R. 144, 2000 SCC 40), the pragmatic and functional approach represents a

principled conceptual model which the Court has used consistently in judicial review.

24 Just as the categorical exceptions to the hearsay rule may converge with the result reached by the *Smith* analysis, the categorical and nominate approaches to judicial review may conform to the result of a pragmatic and functional analysis. For this reason, the wisdom of past administrative law jurisprudence need not be wholly discarded. For example, in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, L'Heureux-Dubé J. invoked the old *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corp.*, [1948] 1 K.B. 223 (C.A.), categorical approach to discretionary decisions as a reflection that ministerial decisions have classically been afforded a high degree of deference (see also *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, at paras. 29-30), but acknowledged that the principled approach must now prevail. Similarly, as Binnie J. recognized in *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, [2001] 2 S.C.R. 281, 2001 SCC 41, at para. 54, under the pragmatic and functional approach, even "the review for abuse of discretion may in principle range from correctness through unreasonableness to patent unreasonableness". The nominate grounds, language of jurisdiction, and ossified interpretations of statutory formulae, while still useful as familiar landmarks, no longer dictate the journey.

25 For this reason, it is no longer sufficient to slot a particular issue into a pigeon hole of judicial review and, on this basis, demand correctness from the decision-maker. Nor is a reviewing court's interpretation of a privative clause or mechanism of review solely dispositive of a particular standard of review: *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, [2001] 2 S.C.R. 100, 2001 SCC 36, at para. 27. The pragmatic and functional approach demands a more nuanced analysis based on consideration of a number of factors. This approach applies whenever a court reviews the decision of an administrative body. As Professor D. J. Mullan states in *Administrative Law* (2001), at p. 108, with the pragmatic and functional approach, "the Court has provided an overarching or unifying theory for review of the substantive decisions of all manner of statutory and prerogative decision makers". Review of the conclusions of an administrative decision-maker must begin by applying the pragmatic and functional approach.

### (3) A Review of the Pragmatic and Functional Factors

26 In the pragmatic and functional approach, the standard of review is determined by considering four contextual factors — the presence or absence of a privative clause or statutory right of appeal; the expertise of the tribunal relative to that of the reviewing court on the issue in question; the purposes of the legislation and the provision in particular; and, the nature of the question — law, fact, or mixed law and fact. The factors may overlap. The overall aim is to discern legislative intent, keeping in mind the constitutional role of the courts in maintaining the rule of law. I find the approach taken in the courts below problematic. As a result, I believe it will be helpful to re-articulate the focus of the factors involved and update the considerations relevant to each. Before doing this, I must emphasize that consideration of the four factors should enable the reviewing judge to address the core issues in determining the degree of deference. It should not be viewed as an empty ritual, or applied

mechanically. The virtue of the pragmatic and functional approach lies in its capacity to draw out the information that may be relevant to the issue of curial deference.

27 The first factor focuses generally on the statutory mechanism of review. A statute may afford a broad right of appeal to a superior court or provide for a certified question to be posed to the reviewing court, suggesting a more searching standard of review: see *Southam*, *supra*, at para. 46; *Baker*, *supra*, at para. 58. A statute may be silent on the question of review; silence is neutral, and "does not imply a high standard of scrutiny": *Pushpanathan*, *supra*, at para. 30. Finally, a statute may contain a privative clause, militating in favour of a more deferential posture. The stronger a privative clause, the more deference is generally due.

28 The second factor, relative expertise, recognizes that legislatures will sometimes remit an issue to a decision-making body that has particular topical expertise or is adept in the determination of particular issues. Where this is so, courts will seek to respect this legislative choice when conducting judicial review. Yet expertise is a relative concept, not an absolute one. Greater deference will be called for only where the decision-making body is, in some way, more expert than the courts and the question under consideration is one that falls within the scope of this greater expertise: see *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, 2002 SCC 11, at para. 50. Thus, the analysis under this heading "has three dimensions: the court must characterize the expertise of the tribunal in question; it must consider its own expertise relative to that of the tribunal; and it must identify the nature of the specific issue before the administrative decision-maker relative to this expertise": *Pushpanathan*, *supra*, at para. 33.

29 Relative expertise can arise from a number of sources and can relate to questions of pure law, mixed fact and law, or fact alone. The composition of an administrative body might endow it with knowledge uniquely suited to the questions put before it and deference might, therefore, be called for under this factor: *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, at pp. 591-92. For example, a statute may call for decision-makers to have expert qualifications, to have accumulated experience in a particular area, or to play a particular role in policy development: *Mattel*, *supra*, at paras. 28-31. Similarly, an administrative body might be so habitually called upon to make findings of fact in a distinctive legislative context that it can be said to have gained a measure of relative institutional expertise: e.g., *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554. Simply put, "whether because of the specialized knowledge of its decision-makers, special procedure, or non-judicial means of implementing the Act", an administrative body called upon to answer a question that falls within its area of relative expertise will generally be entitled to greater curial deference: *Pushpanathan*, *supra*, at para. 32.

30 The third factor is the purpose of the statute. Since the conceptual focus of the pragmatic and functional approach is upon discerning the intent of the legislature, it is fitting that reviewing courts are called upon to consider the general purpose of the statutory scheme within which the administrative

decision is taking place. If the question before the administrative body is one of law or engages a particular aspect of the legislation, the analysis under this factor must also consider the specific legislative purpose of the provision(s) implicated in the review. As a general principle, increased deference is called for where legislation is intended to resolve and balance competing policy objectives or the interests of various constituencies: see *Pushpanathan*, *supra*, at para. 36, where Bastarache J. used the term "polycentric" to describe these legislative characteristics.

31 A statutory purpose that requires a tribunal to select from a range of remedial choices or administrative responses, is concerned with the protection of the public, engages policy issues, or involves the balancing of multiple sets of interests or considerations will demand greater deference from a reviewing court : see *Pezim*, *supra*, and *Southam*, *supra*. In *Mount Sinai*, *supra*, at para. 57, Binnie J. recognized that the express language of a statute may help to identify such a purpose. For example, provisions that require the decision-maker to "have regard to all such circumstances as it considers relevant" or confer a broad discretionary power upon a decision-maker will generally suggest policy-laden purposes and, consequently, a less searching standard of review (see also *Baker*, *supra*, at para. 56). Reviewing courts should also consider the breadth, specialization, and technical or scientific nature of the issues that the legislation asks the administrative tribunal to consider. In this respect, the principles animating the factors of relative expertise and legislative purpose tend to overlap. A legislative purpose that deviates substantially from the normal role of the courts suggests that the legislature intended to leave the issue to the discretion of the administrative decision-maker and, therefore, militates in favour of greater deference.

32 In contrast, a piece of legislation or a statutory provision that essentially seeks to resolve disputes or determine rights between two parties will demand less deference. The more the legislation approximates a conventional judicial paradigm involving a pure *lis inter partes* determined largely by the facts before the tribunal, the less deference the reviewing court will tend to show.

33 The final factor is the nature of the problem. In appellate review of judicial decisions, the nature of the question is almost entirely determinative of standard of review: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33. For example, as the *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802, and *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 S.C.R. 114, line of cases has made clear, judicial decisions of first instance on factual issues will only be interfered with where the appellate court can identify a "palpable and overriding error" or where the finding was "clearly wrong": *Kathy K*, at pp. 806 and 808. But the conceptual foundation of review of administrative decisions is fundamentally different than that of appeals from judicial decisions. Consequently, in the context of judicial review of administrative action, the nature of the question is just one of four factors to consider when determining standard of review.

34 When the finding being reviewed is one of pure fact, this factor will militate in favour of showing more deference towards the tribunal's decision. Conversely, an issue of pure law counsels in

favour of a more searching review. This is particularly so where the decision will be one of general importance or great precedential value: *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3, at para. 23. Finally, with respect to questions of mixed fact and law, this factor will call for more deference if the question is fact-intensive, and less deference if it is law-intensive.

35 Having considered each of these factors, a reviewing court must settle upon one of three currently recognized standards of review: see *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20, released concurrently. Where the balancing of the four factors above suggests considerable deference, the patent unreasonableness standard will be appropriate. Where little or no deference is called for, a correctness standard will suffice. If the balancing of factors suggests a standard of deference somewhere in the middle, the reasonableness *simpliciter* standard will apply.

(4) Application to the Case at Bar

36 Applying the pragmatic and functional approach in this case, the four factors lead to a standard of reasonableness *simpliciter*. The fact that the statute provides a broad right of appeal and that the Committee is no more expert than the courts on the issue in question suggests a low degree of deference.

37 An assessment of the purpose of the statute and the provision in particular yields an ambivalent result. On one hand, the legislature's intent for the legislation as a whole was to assign to the College the role of balancing competing interests and multiple policy objectives, like the protection of the public, education and qualification of members, the setting of standards of ethics and practice, and the administration of privacy regimes: the Act, s. 3. This purpose suggests considerable deference. However, the discrete issue of adjudicating a claim of professional misconduct — the particular issue that the statute puts before the Committee — is quasi-judicial in nature, and therefore militates against deference. In the result, the purpose analysis counsels neither for great deference, nor for exacting scrutiny.

38 Finally, however, the need for deference is greatly heightened by the nature of the problem — a finding of credibility. Assessments of credibility are quintessentially questions of fact. The relative advantage enjoyed by the Committee, who heard the *viva voce* evidence, must be respected.

39 Balancing these factors, I am satisfied that the appropriate standard of review is reasonableness *simpliciter*. The reviewing judge should have asked herself whether the Committee's assessment of credibility and application of the standard of proof to the evidence was unreasonable, in

the sense of not being supported by any reasons that can bear somewhat probing examination (see *Ryan*, *supra*, at para. 46).

40 The reviewing judge did not adopt this analysis. Indeed, she made no reference at all to the pragmatic and functional approach. The effect of the reviewing judge's failure to conduct the usual administrative law analysis was essentially to proceed on what amounted to a correctness standard. One of the factors under the pragmatic and functional approach is whether the statute grants a right of appeal. But it is only one. The reviewing judge considered only this factor and, as a result, she applied too strict a standard. Specifically, she failed to address the need for deference in view of the purpose of the Act and the nature of the problem, credibility. A proper consideration of all the factors required by the pragmatic and functional approach would have yielded a standard of reasonableness *simpliciter*, not correctness. In effect, the reviewing judge erroneously instructed herself to review the Committee's findings of fact on a correctness basis.

41 The reviewing judge's analysis of the corroborative evidence confirms that she assessed the Committee's findings of credibility from the perspective of correctness, rather than reasonableness. For example, when addressing the Committee's reliance upon the discrepancy between Dr. Q's letter to the College and the number of times he had actually had lunch with Ms. T, the reviewing judge argued that "one explanation for Dr. Q.'s less than forthright description of his lunch relationship with Ms. T. is that the letter was written without dealing with specific allegations pursuant to legal advice" (para. 13). Yet when the standard of review is reasonableness, the reviewing judge's role is not to posit alternate interpretations of the evidence; rather, it is to determine whether the Committee's interpretation is unreasonable. When considering the Committee's conclusion that Ms. T's ability to describe distinct bodily markings suggested an intimate relationship between Ms. T and Dr. Q, the reviewing judge noted that Ms. T had some experience as a surgical nurse and asserted that, "[i]n my view, her description is no more vivid than one might expect from someone who has experience with surgical scars if such a scar had been described to her as Dr. Q testified he had done" (para. 20). With respect, when applying a standard of reasonableness *simpliciter*, the reviewing judge's view of the evidence is beside the point; rather, the reviewing judge should have asked whether the Committee's conclusion on this point had some basis in the evidence (see *Ryan*, *supra*). Finally, when assessing the Committee's finding that a letter sent by Dr. Q to Ms. T supported the conclusion that a sexual relationship existed, the reviewing judge stated the following (at para. 25):

> While there is no doubt that for many the wording of the letter is such as to raise a suspicion or question as to the nature of the relationship; nevertheless it is, in my view, not clear and cogent evidence corroborative of a sexual relationship as testified to by Ms. T.

If there is "no doubt" that the letter could be interpreted as evidence of a sexual relationship, such an interpretation cannot be unreasonable and, therefore, the reviewing judge's preferred view is irrelevant.

42 I conclude that the reviewing judge erred by applying too exacting a standard of review and substituting her own view of the evidence for that of the Committee.

C. *The Role of the Court of Appeal*

43 The Court of Appeal stated that "[t]he standard that we must apply in assessing the judgment of Madam Justice Koenigsberg is whether in her re-weighing of the evidence she was clearly wrong" (para. 25). This is not the appropriate test at the secondary appellate level. The role of the Court of Appeal was to determine whether the reviewing judge had chosen and applied the correct standard of review, and in the event she had not, to assess the administrative body's decision in light of the correct standard of review, reasonableness. At this stage in the analysis, the Court of Appeal is dealing with appellate review of a subordinate court, not judicial review of an administrative decision. As such, the normal rules of appellate review of lower courts as articulated in *Housen*, *supra*, apply. The question of the right standard to select and apply is one of law and, therefore, must be answered correctly by a reviewing judge. The Court of Appeal erred by affording deference where none was due.

44 The Court of Appeal should have corrected the reviewing judge's error, substituted the appropriate standard of administrative review, and assessed the Committee's decision on this basis. Judged on the proper standard of reasonableness, there was ample evidence to support the Committee's conclusions on credibility, burden of proof and application of the burden of proof to the factual findings. It follows that the decisions of the reviewing judge and the Court of Appeal should be set aside and the order of the College restored.

IV. The Publication Ban and Sealed File

45 In its final judgment on the merits, the British Columbia Court of Appeal confirmed a publication ban, ordered that the materials in this case not be searched, and that the parties continue to be known as Dr. Q and Ms. T. On May 8, 2001, on consent of the parties, Arbour J. granted a motion to seal the file in this Court. The scope of a general order from this Court sealing a file is extremely broad, preventing publication of even the nature of the case. Owing to the importance of openness in the administration of justice, sealing files and ordering publication bans are unusual steps. Now that this Court has rendered judgment, such sweeping orders are no longer necessary and the orders can be refined.

V. Disposition

46 The appeal is allowed with costs to the appellant throughout. The record, including any personal documents and therapeutic records, will remain sealed at this Court and in the courts below. While the judgment of the Court and the courts below will remain public, publication of the name of the complainant and of any facts or other names that would reveal her identity are banned. Disclosure of the name of a doctor who has been disciplined by the College is a matter normally determined by the Council of the College of Physicians and Surgeons. Now that a decision has been rendered in this case, the issue of whether Dr. Q's name should be disclosed is to be decided by the Council in accordance with its normal practices.

*Appeal allowed with costs.*

*Solicitors for the appellant: Miller Thomson, Vancouver.*

*Solicitors for the respondent: Harper Grey Easton, Vancouver.*